UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Use of Contractors to Conduct Clean Air Act Inspections after the Supreme Court's Decision in United States v. Stauffer Chemical Co., No. 82-1448 (decided January 10, 1984)

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TO: Regional Counsels
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Many of you are aware that EPA's authority to designate contractors as "authorized representatives" of the Administrator to conduct inspections under §114 of the Clean Air Act was one of the issues presented to the Supreme Court in United States v. Stauffer Chemical Co., No. 82-1448. The case was heard by the Court on November 2, 1983, and decided on January 10, 1984. The purpose of this memorandum is to inform you of the decision's effect on EPA's authority to use contractors, and to advise you of EPA's present policy regarding the use of contractors to conduct inspections. A copy of the Supreme Court's decision is attached.

Supreme Court's Decision

This case came before the Court on a petition for certioriari from the United States Court of Appeals for the Sixth Circuit. Two questions were presented to the Supreme Court: (1) Whether EPA may designate a private contractor to conduct inspections as its "authorized representative" under §114 of the Clean Air Act, and (2) whether the government should be collaterally estopped from relitigating against Stauffer Chemical Company the question of whether private contractors can be "authorized representatives" because it had already litigated that question in a proceeding involving a different plant against Stauffer in the Tenth Circuit and lost.

FEB 25 1998
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The Supreme Court unanimously held that "the doctrine of mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." (Slip opinion at 4.) Therefore, the government was collaterally estopped from relitigating the statutory question against Stauffer, at least in those circuits in which the issue was one of first impression. The Court did not address the question of EPA's authority to use contractors for inspections under the Clean Air Act.

Background

This case arose out of Stauffer Chemical Company's refusal to allow private contractor employees, who had been designated by EPA as "authorized representatives" under §114(a)(2), to enter one of Stauffer's plants in Tennessee. When Stauffer refused to allow the contractor's employees to enter its plant, EPA obtained a warrant authorizing the contractor's employees to enter the plant for the purpose of conducting an inspection. Stauffer refused to honor the warrant. When EPA brought a civil contempt action in District Court, Stauffer moved to quash the warrant. The District Court denied Stauffer's motion, accepting EPA's argument that the inspection authority conferred upon "authorized representatives" by §114(a)(2) extends to private contractors retained by EPA. United States v. Stauffer Chemical Co., 511 F. Supp. 744 (M.D. Tenn. 1981). Stauffer appealed this decision to the Sixth Circuit.

In the Sixth Circuit Stauffer argued that (1) private contractors are not "authorized representatives" as that term is used in §114(a)(2) of the Clean Air Act, and (2) that the government should be collaterally estopped from relitigating the statutory question against Stauffer because it had already litigated that question against Stauffer and lost in the Tenth Circuit, in Stauffer Chemical Co. v. EPA, 647 F.2d 1075 (1981) (hereinafter Stauffer I). The Sixth Circuit's decision, United States v. Stauffer Chemical Company, 684 F.2d 1174 (1982) (hereinafter Stauffer II), reversed the Tennessee District Court, but the three judges did not agree on the basis for the decision. Two judges agreed with the Tenth Circuit that private contractors are not authorized to conduct inspections under §114(a)(2). One of those two also held that the government was collaterally estopped from relitigating this statutory question against Stauffer. The third judge held that the government was collaterally estopped from relitigating the question against Stauffer, and therefore expressed his opinion that the court should not have reached the merits of the

statutory question. Both the collateral estoppel issue and the question of statutory authority were presented to the Supreme Court. The Supreme Court affirmed the holding of the Court of Appeals that the government is estopped from relitigating the statutory question against Stauffer. The Supreme Court did not reach the merits of the statutory question.

The Effect of this Decision

Because the Supreme Court did not reach the issue of statutory construction, its decision leaves unresolved the pre-existing split in court decisions on the question of EPA's authority to use contractors for inspections. The Tenth Circuit, in Stauffer I, and the Sixth Circuit, in Stauffer II, have held that only EPA officers and employees may be "authorized representatives" of the Administrator under §114(a)(2). The Ninth Circuit in Bunker Hill Co. v. EPA, 658 F.2d 1280 (1981), and one District Court (in the Fourth Circuit) in Aluminum Co. of America v. EPA, No. M-80-13 (M.D.N.C. Aug. 5, 1980), have held that EPA may designate contractors as authorized representatives under §114(a)(2).

It had been hoped that the Supreme Court would rule on the statutory question and resolve the issue of whether contractors and their employees could be designated by EPA as "authorized representatives" of the Administrator under §114(a)(2). It did not do so. Final resolution of the statutory question could be reached by a clarifying amendment to the Act or by one or more additional test cases in circuits which have not ruled on the question (assuming the Supreme Court would grant certioriari in such a case).

EPA's Present Policy on Use of Contractors to Conduct Inspections

It continues to be EPA's position that both the language and the legislative history of §114 support the use of contractors as designated "authorized representatives" of the Administrator under §114(a)(2). The Supreme Court clearly decided that EPA may not relitigate this issue with Stauffer in any of the circuits which have not yet ruled on the question. The Supreme Court did not decide whether Stauffer is also immune from relitigation of this issue in the Ninth Circuit or in other jurisdictions where either Federal courts or state courts have ruled in EPA's favor. Therefore, EPA will not designate contractors as representatives of EPA to conduct inspections at Stauffer facilities, except perhaps in the Fourth and Ninth Circuits.

Contractors should not, absent express permission from Headquarters, be designated as representatives of EPA to conduct inspections pursuant to §114(a) in the Sixth or Tenth Circuits. The following states are located in

the Sixth and Tenth Circuits: Kentucky and Tennessee in Region IV, Michigan and Ohio in Region V, New Mexico and Oklahoma in Region VI, Kansas in Region VII, and Colorado, Utah and Wyoming in Region VIII.

Contractors may definitely be designated as representatives of EPA in the Ninth Circuit. States located in the Ninth Circuit are: Montana in Region VIII; Arizona, California, Nevada, Guam and Hawaii in Region IX; Alaska, Idaho, Oregon, and Washington in Region X. Therefore, EPA may continue to use contractors to conduct inspections of facilities in the Ninth Circuit.

The First, Second, Third, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits have not ruled on the question of whether contractors may be designated as authorized representatives of EPA.[1] In the absence of any ruling prohibiting their use, EPA may continue to use contractors to conduct inspections of facilities owned by anyone other than Stauffer in these circuits.

It is important that the Air Enforcement Division be kept informed of any potential new litigation on this issue so that the agency's litigation efforts can be focused and coordinated. Toward this end, we are asking the Regions to notify and consult with Tracy Stewart, an attorney in the Office of Enforcement and Compliance Monitoring (at FTS 382-2824) whenever the Regional Office wishes to seek a warrant to gain entry for a contractor. A warrant may be sought after a source has refused entry to a contractor or prior to seeking entry if the Region has reason to expect that the source will challenge the contractor's right of entry under §114. We hope that Regions will not be deterred from using contractors, where it would otherwise be appropriate, by the mere possibility of a court challenge.

Attachment

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[1] The Middle District of North Carolina, located in the Fourth Circuit, has affirmed EPA's authority to designate contractors as representatives of the Administrator. Aluminum Co. of America v. EPA, supra.